United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2131

To be argued by:
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
JAMES HAWKINS,

Appellant,

-against-

J. EDWIN LaVALLEE,
Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Appellee.

Docket No. 75-2131

B
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the trial court's failure to order any further inquiry into appellant's competency prior to his retrial deprived appellant of due process.

2. Whether the District Court's conclusion that the State had the burden of proving appellant's competency at the October coram nobis hearing was correct, but the District Court erred in not granting the writ or holding an evidentiary hearing.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Eastern District of New York (Weinstein, J.) entered on August 25, 1975, denying petitioner-appellant Hawkins' pro se application pursuant to 28 U.S.C. §2241, §2254 for a writ of habeas corpus.

On October 2, 1975, the District Court granted appellant's application for a certificate of probable cause.

By order dated October 28, 1975, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for petitioner-appellant on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Introduction

On October 2, 1975, the Bensonhurst Nursing Home in Brooklyn, New York, was robbed by three armed men -- Johnson, Williams, and Grant -- all of whom were arrested within one week afterwards as the robbers. All three pleaded guilty to the robbery, and received sentences of no more than three

years' imprisonment (T.12, 85, 111-112, 131-132*). Appellant James Hawkins, who had worked at the nursing home until a few weeks prior to the robbery, was arrested for the same robbery two years later on November 18, 1966.** He was indicted by a Kings County grand jury in December 1966 on robbery, grand larceny, and assault charges*** as the person allegedly responsible for planning the robbery. He was ultimately tried and convicted of those charges after a jury trial held on December 3-5, 1968 (T.29, 137). Appellant, who was fifty-three years old at the time, was sentenced on April 25, 1969, as a multiple felony offender to a term of imprisonment of from fifteen years to life (S.7****).

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*Numerals in parentheses preceded by "T" refer to pages of the transcript of appellant's trial, commencing December 3, 1968, and found as Document #1 to the supplemental record on appeal.

**Appellant was first arrested in October 1964, but the charges were dismissed on February 1, 1965, for failure to prosecute. See minutes of the pretrial proceedings, dated November 8, 1967, at 6-7, found as Document #2 to the supplemental record on appeal.

***While appellant was also indicted on charges of criminally receiving and concealing stolen property, those charges were dismissed by the court prior to submission of the case to the jury (T.176).

****Numerals in parentheses preceded by "S" refer to pages of the transcript of appellant's sentencing proceeding, dated April 25, 1969, and found as Document #3 (Exhibit E) to the record on appeal. As a fourth felony offender, appellant's life sentence was mandatory (N.Y.P.L. §1942 (1909)). However, the penal law was revised in 1965, and the new sentencing statute for multiple felony offenders (P.L. §70.10), effective September 1, 1967, gave the sentencing court discretion to impose a life sentence. Counsel's application to have appellant receive the benefit of the new provision on sentencing was denied (S.9).

Prior to the trial which resulted in appellant's conviction, an earlier trial had commenced. However, during that trial, appellant suffered a seizure. As a consequence, a psychiatric examination was conducted which resulted in a report that appellant was incompetent to stand trial. A mistrial was declared, and appellant was committed to Matteawan State Hospital for the Criminally Insane. It was also subsequently disclosed that appellant had a long history of mental disorder dating back to 1946. Nevertheless, upon the report of doctors at Mattawan, made little more than four months after the declaration of a mistrial in the first case, appellant was deemed competent to stand trial, and was tried five months later without further inquiry or hearing on the question of his incompetency, before the same judge who presided over the mistrial.

B. State Court Proceedings

Appellant's initial trial on the indictment commenced before The Honorable John T. Ryan and a jury in February 1968. Appellant was represented by assigned counsel, Abraham Gartenhaus, Esq. During the course of the trial, appellant suffered what appeared to Justice Ryan "to be an epileptic seizure and [he] has behaved strangely during the trial."*

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*See letter of Dr. Daniel Schwartz, director of the Forensic Psychiatry Service of Kings County Hospital, dated August 4, 1972, p. 1, found as "E" to appellant's separate

On February 14, 1968, Justice Ryan halted the trial and committed appellant to Kings County Hospital for a psychiatric examination.* In a report dated February 16, 1968, the examining physicians at Kings County Hospital concluded that appellant was incompetent to stand trial.** That conclusion was based on the following procedures and findings:

> On February 15, 1968, immediately after his third admission to Kings County Hospital, an EEG was reported as "abnormal, non-paroxysmal EEG with defense sole activity somewhat more accentuated over the right posteria area. This type of EEG is non-specific." On psychiatric examination he was disoriented, irrelevant, incoherent

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(Footnote continued from the preceding page)

appendix. While the minutes of appellant's February 1968 mistrial apparently have not been transcribed, Dr. Schwartz's report, prepared for appellant's later hearing on a coram nobis petition, admitted at that hearing, and submitted to the District Court in the instant case, quoted from a letter written by Justice Ryan, dated February 14, 1968, describing appellant's behavior at trial and apparently addressed to the medical authorities at Kings County Hospital, to which institution the court had committed appellant. The original of Justice Ryan's letter has not been supplied to counsel on this appeal.

*See the endorsement sheet for Indictment No. 3432/66, found as Document #3 to the supplemental record on appeal. The endorsement sheet reflects the notation for February 14, 1968, that "During trial, Court commits Deft. to Kings Co. Hospital for mental examination."

**See Order and Memorandum decision of Justice William T. Cowin, entered January 5, 1973, denying appellant's motion to vacate the judgment, p.1, "C" to appellant's separate appendix.

> and smiling inappropriately. He was diagnosed as suffering from a chronic brain syndrome with convulsive disorder....
>
> Emphasis added.*

Based on that report, a mistrial was declared, and appellant was committed to Matteawan State Hospital on March 4, 1968.**

By letter dated June 25, 1968, however, the Superintendent of Matteawan, Dr. W.C. Johnston, certified to Justice Ryan that appellant was fit to proceed to trial.*** Dr. Johnston's conclusion was apparently based on the results of tests conducted at Matteawan by Drs. Tekben and Friedman, whose diagnosis was

> ... psychoses due to convulsive disorder. Epileptic clouded stated. On discharge recovered from psychotic episode.
>
> (H.11).****

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*See "E" to appellant's separate appendix, at 3. The original report of the Kings County Hospital doctors has not been supplied to counsel on this appeal.

**See "C" to appellant's separate appendix, at 1.

***See "F" to appellant's separate appendix.

****Numerals in parentheses preceded by "H" refer to pages of the transcript of the first hearing, dated August 4, 1972, held on appellant's motion to vacate the judgment before The Honorable William T. Cowin, and found as Document #4 to the supplemental record on appeal. See also "E" to appellant's separate appendix, at 3.

Accordingly, an order was entered on June 28, 1968, reinstating the proceedings against appellant, and ordering his production in Supreme Court, Kings County.* On July 11, 1968, appellant was again arraigned on the indictment, apparently before Justice Ryan.** He was represented at this proceeding for the first and only time by one Joseph Slavin, Esq., who withdrew from the case afterwards, but not before apparently agreeing to confirm the report from Matteawan finding appellant competent to stand trial.***

Subsequently, Mr. Gartenhaus, who had represented appellant at his first aborted trial, was reassigned to represent appellant. On October 28, 1968, however, Mr. Gartenhaus asked to be, and was, relieved of his assignment after the following colloquy before The Honorable Oliver D. Williams:

> MR. GARTENHAUS: Your Honor, at this time I wish to state that when I got into this case, I told Judge Barshay that as far as I was concerned, I would not have approved the psychiatric report that came from Matteawan because this man was four times in a mental institution, and in my opinion he's still insane, and I don't care what the psychiatrist thought. The

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*See Document #5 to the supplemental record on appeal.

**See the endorsement sheet for Indictment No. 3432/66, Document #3 to the supplemental record on appeal. The minutes of appellant's appearance on July 11, 1968, have apparently not been transcribed and, in any event, have not been supplied to counsel on appeal.

***See endorsement sheet, Document #3 to the supplemental record on appeal, which reflects the endorsement for July 11, 1968: "662-B - Restored to trial calendar. Bail $10,000. Atty. Slavin withdraws, Adm. Malbin to assign Atty. A. Gartenhaus.

perfunctory method -- Judge Barshay asked me to stay along with it --

* * *

This case was tried about six or seven months ago, in the course of which time, in the course of the trial, the defendant went into several epileptic fits, and when he went into his last fit, I made an application before Judge Ryan for him to be re-examined by a psychiatrist, which Judge Ryan graciously did; and they found him insane.

THE COURT: Found him what?

MR. GARTENHAUS: The hospital, Kings County, found that he was unable to stand trial; he was not mentally capable of standing trial. They found brain syndrome -- they also found a brain syndrome there -- and Judge Ryan declared a mistrial.

Before I was assigned to this case, he appeared before a re-arraignment, and some lawyer -- a good lawyer, let us say -- accepted the report of the Matteawan -- the psychiatrist's report that the man was now able to stand trial again. I told Judge Barshay that if I had been here, if I had been in the case when he was re-arraigned, I would not have accepted that report, and as far as I was concerned, I thought that -- that we should obtain an opportunity and have a hearing on the basis of it.

THE COURT: What is the date of that report?

MR. GARTENHAUS: That was when -- that was about three months ago. I never got a copy of that report, but I was assigned after he was re-arraigned, and I told Judge Barshay that I felt that he -- that we should have a hearing on the question of insanity. I said, "Judge Ryan, my client doesn't want to go along with it. He doesn't have to."

* * *

> I put 8 months into his case the last time. I spent my life on him. He knows it. I've been very good to this man; but legally and basically, I don't accept what's going on. I cannot objectively -- I cannot objectively defend him because I feel personally that a man who spent four times in a mental institution and then went into an epileptic fit and again was declared insane for the fifth time -- somewhere down the line I feel he needs medical help. I don't want to see -- if he gets convicted, I don't seem to think that this man should ever go to jail again; he doesn't belong there; and if he gets acquitted, he needs medical help. As long as I cannot objectively defend this man -- because if I defend him, I have to fight to have him acquitted, and if he loses, he goes to jail, and under either circumstance, I am not happy; I'm not satisfied.[*]

During this proceeding, appellant and the court also engaged in colloquy, during which appellant asked for a speedy trial and indicated several times that he was a victim of "a conspiracy of delay."**

Appellant was assigned new counsel, Leo Nachbar, Esq., and the case proceeded to trial on December 3, 1968, before Justice Ryan, who had presided over appellant's earlier mistrial. At the time of trial, appellant's counsel apparently did not request any further mental examination for appellant, did not contend that appellant was incompetent to stand trial, and did not raise a defense of insanity. Moreover, Justice

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*See transcript of the proceedings of October 28, 1968, at 2-5, found as Document #3 (Exhibit C) to the record on appeal.

**See Document #3 (Exhibit C) to the record on appeal.

Ryan made no further inquiry into or finding on appellant's competency to stand trial.

C. The Trial

Three prosecution witnesses, who were employees of the Bensonhurst Nursing Home and were present at the time of the robbery, described the manner in which the robbery occurred. Approximately $10,000 was taken, as well as a ring from the hand of one of the women victims (Schwartz, T.10-20; Kaye, T.21-31; McFashion, T.32-39).

Eloise and Henry Rayborn, two prosecution witnesses who ran a candy store in Harlem, testified that appellant came to the store some time between September and November 1964 and wanted to pawn a ring which was subsequently identified as the one taken during the robbery. Henry Rayborn, whose conflicts with the law included narcotics, car theft, and murder, purchased the ring for Eloise by paying appellant $25.00. Eloise wore the ring for two years before the police took it from her (E.Rayborn, T.39-55; H.Rayborn, T.56-71).

Yvonne Jackson, another prosecution witness and the girlfriend of Grant, one of the convicted robbers, testified that during a conversation with appellant held at Columbus Circle some time after the arrest of Grant, appellant told her that he and the three other men had committed a robbery during which rings and money were taken and the proceeds divided equally among themselves (Jackson, T.74-93).

Leroy Johnson, one of the three actual robbers who was on parole at the time of appellant's trial, testified that the robbery was planned by appellant, who gave firearms to the robbers and accompanied them to the neighborhood of the nursing home to point out the establishment to them. After the robbery, the four men met back at an apartment where the proceeds of the robbery were divided. When Johnson left the apartment, Grant had possession of the ring and was going to try to sell it. Johnson testified, however, that several days later appellant possessed the ring and agreed to undertake to sell it. Johnson also testified that on the night before his arrest and after Grant's arrest, Johnson met appellant at Columbus Circle, where appellant told him he had purchased a car with which they could leave the city in a few days.

Johnson and David Williams, the third robber, were arrested the next day. While Johnson told the police of his own, Williams' and Grant's involvement in the robbery, he failed to mention appellant's involvement until after his sentence, when the police told Johnson he could help himself on parole if he cooperated (Johnson, T.94-136).

In defense, appellant called David Williams, one of the robbers, who had spoken to appellant's counsel for the first time just prior to being called as a witness. He completely exculpated appellant, testifying that appellant had absolutely no involvement in the robbery. He explained his previous

statements to the contrary, made to the Assistant District Attorney at Comstock Prison and to the grand jury, in the following manner:

> Well, when they came to Comstock, they told me they would go light with me with the Parole Board, if I would comply with their wishes when I was out on parole. They told me my parole would be revoked if I didn't testify.
>
> (T.151).

Concerning the ring taken during the robbery, Williams testified that Grant lost the ring during a dice game on 115th Street (T.168).*

Appellant, who did not testify at his trial, was convicted of robbery, larceny, and assault, resulting in the life sentence he is currently serving.

D. Post-Conviction State Proceedings

In November 1968, during the pendency of appellant's direct judgment appeal, he filed a petition for a writ of error coram nobis raising the issue of his competency to stand trial. In an answering affidavit dated January 26, 1970, Assistant District Attorney William I. Siegel consented to a hearing because, in view of a lengthy psychiatric history detailed by appellant in his petition and the earlier

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*Henry Rayborn, whose candy store was located at 115th Street, had testified previously that he played "craps" in the vicinity of the store during the period in which the robbery occurred (T.39-40, 58, 65).

mistrial before Justice Ryan, "the interest of justice requires that he be accorded a hearing 'to determine whether or not the certification of sanity by Matteawan State Hospital in June, 1968 was adequate to determine the defendant's fitness for trial in October of that year.'"* The petition was withdrawn, however, without prejudice to renew it after completion of appellant's direct appeal process.**

On the appeal to the Appellate Division, Second Department, appellate counsel (William Erlbaum, Esq.) informed the court in his brief that "appellant has requested that I raise a question concerning his competency to stand trial," but noted that many of the facts concerning appellant's lengthy psychiatric history did not appear on the face of the record on appeal and that the issue would be "better left for coram nobis treatment."*** Appellant's conviction was affirmed without opinion by the Appellate Division, Second Department, on September 27, 1971 (37 A.D.2d 801).

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*See affidavit of William I. Siegel, dated December 16, 1971, at 1-3, found as "H" to appellant's separate appendix.

**See "H" to appellant's separate appendix.

***See extract of appellant's brief on appeal to the Appellate Division, Second Department, at 34-35. The extract is "I" to appellant's separate appendix.

In November 1971, appellant filed a motion to vacate the judgment, pursuant to §440.10 of New York's Criminal Procedure Law, once again raising the issue of his incompetency at the time of trial and sentence. In an affidavit dated December 16, 1971, Assistant District Attorney Siegel again consented to a hearing on the motion for the reasons he had previously set forth in his reply to appellant's initial coram nobis petition.*

On August 4, 1972, a hearing on the motion was held before The Honorable William T. Cowin. Appellant's counsel (Abraham S. Medwin, Esq.) took the position at the hearing that, notwithstanding the report from Matteawan finding appellant competent to be tried, appellant's previous history of mental disorder required that the trial court conduct a hearing or order some further inquiry into appellant's competency prior to trial (H.8, 12, 15).

Appellant, who was now fifty-seven years old, testified at the hearing that he remembered nothing of his trial in December 1968, nor did he remember his attorney at that trial, Leo Nachbar, Esq., who was now deceased. His information concerning the trial came from reading the minutes and other documents which had been supplied to him (H.17-18, 20-21). He had been receiving drugs for epliepsy since 1946, and had received medicine while confined in the Brooklyn House of

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*See "H" to appellant's separate appendix.

Detention pending trial (H.18). He had other seizures in the Brooklyn House of Detention between the time of his return from Matteawan in July 1968 and his trial in December 1968, but did not remember being sent to a hospital for treatment (H.19-20). The District Attorney agreed with counsel that, while the records of Brooklyn House of Detention showed that appellant had not been hospitalized during this period, those same records showed that he had received continuous medication for epilepsy (H.21-22).

In addition to appellant's testimony, a report prepared for appellant's hearing on the motion by Dr. Daniel W. Schwartz, Director of the Forensic Psychi try Service of Kings County Hospital Center, and dated August 4, 1962, was introduced (H. 24).* The report was based on one interview Dr. Schwartz had with appellant in the Supreme Court, Kings County, on May 17, 1972, and a review of appellant's medical records.

The report detailed a long history of hospitalization and treatment of appellant for various mental disorders. The report included the findings of other doctors who had previously observed and treated appellant, resulting in diagnoses that appellant was suffering at various times from, among other things, "schizophrenia, unclassified," "psychosis due to convulsive disorder, epilepsy, clouded states," "sociopath," "reactive state," "psychosis with psychopathic personality,"

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*See "E" to appellant's separate appendix.

"chronic brain syndrome with convulsive disorder."

Nevertheless, Dr. Schwartz concluded: "It is my professional opinion that there is no indication that the defendant was not fit to proceed at the time of his trial in December, 1968." Dr. Schwartz gave three reasons for this opinion: (1) his conclusion that appellant's "whole history of seizures ... is questionable" because, among other things, Army records failed to show that appellant had suffered a head injury or epilepsy, or that appellant had ever applied for Army disability benefits on this basis, despite the fact that appellant had attributed his epilepsy to a blow on the head received while in the Army;* (2) appellant's "conversation of his state of mind at the time of the present offense has varied" in that "when first admitted to Kings County Hospital fourteen months after the robbery of the nursing home,

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*In an "Affidavit of Reply," filed by appellant in the District Court, and found as Document #4 to the record on appeal, appellant contested the assertion of Dr. Schwartz concerning the Army records. Appellant stated in that affidavit:

> Petitioner was informed by the St. Louis, Missouri, Army record headquarters, that his records was destroyed by fire, that is why the records did not indicate petitioner's injuries, moreover petitioner could not apply for benefits, because he was given an undesirable discharge."

he made no claim of seizures at the time of the robbery or of amnesia for that period of his life. Two years later he was claiming seziures and amnesia;" and (3),

> Most important is the fact that the defendant was fit to proceed when examined in Matteawan on June 14, 1968 by Doctors Tekben and Friedman. Without any evidence to the contrary I must assume that the defendant continued in this state of mind. There is nothing in the jail records or the minutes of the trial to indicate the contrary.
>
> Emphasis added.

On September 24, 1972, Justice Cowin rendered his memorandum decision on appellant's motion.* He set forth the issue raised by the motion as follows:

> The question presented is whether in view of the defendant's long history of mental illness and his illness at the first trial, the court should have ordered on its own motion a psychiatric examination prior to the trial and at the time of sentence. No such examination was ordered.

Justice Cowin apparently concluded that such a psychiatric examination should have been ordered prior to trial, but seemingly concluded that the error could be cured retrospectively by ordering a hearing "to determine the petitioner's competency to stand trial ... [and] at the time of sentencing." (Citations omitted).

On October 20, 1972, almost four years after appellant's trial, a hearing was held before Justice Cowin to determine

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*Justice Cowin's decision, dated September 22, 1972, is "D" to appellant's separate appendix.

whether appellant was competent to stand trial in December 1968. Counsel asserted that the "real issue" at the hearing was

> ... whether the Court in failing to have the defendant examined medically to determine his mental competence for fitness to proceed with the trial on December 3, 1968 deprived this defendant of due process of law.
>
> (C.8).*

He reiterated this position when the court informed him that the burden of proof was on appellant to show that he was incompetent at the time of trial:

> And I say most respectfully, Your Honor, that the overriding issue here is: How can a man prove that when he was never examined at the time....
>
> (C.10).

Nevertheless, counsel attempted to carry the burden of proof by placing appellant on the witness stand. Appellant's testimony at this hearing paralleled his testimony at the prior hearing held on August 4, 1972, to determine whether he was entitled to this second evidentiary hearing. He denied remembering his trial or trial attorney, Mr. Nachbar, who was now deceased (C.12, 21-23, 26-29, 30-33). His knowledge of the facts concerning his conviction was based upon a reading of the record supplied to him (C.32). Moreover, appellant

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*Numerals in parentheses preceded by "C" refer to pages of the transcript of appellant's second hearing, dated October 20, 1972. These minutes appear as Document #3 (Exhibit D) to the record on appeal.

was "not sure" if he recalled appearing before Justice Williams on October 29, 1968, the date Mr. Gartenhaus asked to be relieved of his assignment (C.18).*

At the hearing, it was stipulated that if Justice Ryan were called to testify, he would state that he presided at both the first and second trials (C.36-37, 42-43). At the first trial, he observed appellant suffer a seizure, ordered a mental examination, and declared a mistrial on the basis of a Kings County Hospital report finding appellant incompetent (C.36-37, 42-43). At the second trial, there was no request by counsel or appellant for a mental examination, no objection was entered at trial that appellant was unfit to proceed, and there was no conduct by appellant in the courtroom which would have caused Justice Ryan to question appellant's sanity or to order a new mental examination (C.36).

Dr. Schwartz's report, which was received at the August 4, 1972, hearing, was again stipulated into evidence (C.13-15, 35).

On January 5, 1973, Justice Cowin denied appellant's motion to vacate the judgment in a memorandum opinion.** After noting that "appellant had the burden of proving his claim

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*The prosecutor himself appeared to confuse the date of appellant's appearance before Justice Williams, which was actually October 28, 1968, although the prosecutor apparently believed it was October 29.

**Justice Cowin's memorandum opinion, dated January 5, 1973, is Document #3 (Exhibit A) to the record on appeal.

[of incompetency] by a fair preponderance of the credible evidence," the court found as a fact that

> [t]he claim of the defendant that he does not remember having been before Mr. Justice Williams on October 28, 1968, nor does he recall his retrial on December 3, 4, or 5 of 1968, or his sentencing on April 25, 1969 is a pure fabrication as is the claim that he does not remember the late Leo Nachbar, Esq., his assigned counsel on the retrial and sentence.
>
> This court finds as a matter of law that the defendant has failed to prove by a preponderance of the credible evidence that he was under such incapacity as [sic] the time of trial or sentence as would necessitate the vacating of the judgment.

On March 1, 1973, The Honorable Henry J. Latham, Associate Justice of the Appellate Division, Second Department, granted appellant leave to appeal to that court from Justice Cowin's order denying the motion to vacate the judgment. The Appellate Division affirmed Justice Cowin's order without opinion on April 28, 1975 (47 A.D.2d 1005),* and leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles D. Breitel on May 27, 1975.

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*On appeal from the denial of his motion to vacate the judgment, appellant claimed that (1) the hearing court improperly placed the burden of proof on him to prove his incompetence to stand trial; (2) the evidence was sufficient to find him incompetent at the time of his second trial and sentence; and (3) doubt as to appellant's competence to stand trial was sufficient to require further inquiry on the question as a matter of due process and because it is now impossible to determine appellant's competency retrospectively, a new trial must be ordered.

E. Federal Court Proceedings

On June 26, 1975, appellant filed the instant pro se petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York, raising the same three issues he had previously raised in the Appellate Division on his appeal from the denial of his motion to vacate the judgment.* After directing the State to respond, and receiving the State's affidavit in opposition, the District Court (The Honorable Jack B. Weinstein) dismissed appellant's petition in a memorandum and order, dated August 25, 1975.**

The District Court found that the transcript of the coram nobis hearing of October 20, 1972, confirmed Justice Cowin's opinion that appellant had failed to prove by a preponderance of the credible evidence that he was under such incapacity at the time of trial or sentence as would necessitate the vacating of the judgment. The District Court recognized, however, that

> [i]t can be argued ... that the state should, at the coram nobis hearing, have assumed the burden of showing competency to stand trial at the coram nobis hearing.

Accordingly, the District Court assumed "for the purpose of

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*Appellant's pro se petition is Document #1 to the record on appeal.

**The opinion of the District Court is "B" to appellant's separate appendix.

this opinion" that the State had that burden, but concluded that "another hearing in this court at this time would be fruitless," for the reason that "no further information would result from a hearing."

> This Court, on the record, would be compelled to find no reasonable doubt that petitioner was comptetent to stand trial.

The District Court did not directly address the issue of whether the trial court's failure to conduct any further inquiry into appellant's competency prior to trial was a denial of due process. Nevertheless, "[i]n view of the novel circumstances described in the record and [the] court's memorandum," the District Judge granted appellant's application for a certificate of probable cause on October 2, 1975.*

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*The memorandum and order granting the certificate of probable cause is Document #6 to the record on appeal.

ARGUMENT

Point I

THE TRIAL COURT'S FAILURE TO ORDER ANY FURTHER INQUIRY INTO APPELLANT'S COMPETENCY PRIOR TO HIS RETRIAL DEPRIVED APPELLANT OF DUE PROCESS.

Despite abundant evidence, and an actual finding, of appellant's recent incompetence to stand trial, creating at the very least a reasonable ground for believing that he was still incompetent, the trial judge nonetheless proceeded to try appellant without further inquiry on the issue. His decision to proceed was based merely upon receiving a report from Matteawan prepared five months earlier concluding that appellant was then competent. As a result, appellant may well have been tried, convicted, and sentenced to life imprisonment while he was incompetent, thereby depriving him of due process. Accordingly, the trial judge's failure to order a pretrial inquiry into appellant's competency was itself a denial of due process which could not be cured by the retrospective competency hearing held four years later on appellant's coram nobis petition.

We begin with the proposition, by now firmly established, that the conviction of a defendant while he is mentally incompetent is a violation of due process (Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966);

Bishop v. United States, 350 U.S. 961 (1956)), and that State procedures must be adequate to protect this right. Pate v. Robinson, supra, 383 U.S. at 378. Even where the State procedures are adequate, however, failure to invoke them when the facts warrant it is also a violation of due process. Drope v. Missouri, supra, 420 U.S. at 172.

In Pate v. Robinson, supra, the Court held that it was a denial of due process of law to convict a defendant where there is sufficient doubt of his competency unless a competency hearing is held at the time of trial, and that a later hearing will not cure this defect. In Robinson, the Court found that the Illinois procedures for determining competency, which required a judge to impanel a jury and hold a hearing on his own motion where the evidence raised a "bona fide" doubt as to a defendant's competency, were adequate to protect the due process right not to be tried while incompetent. Id., 383 U.S. at 385. The Court determined, however, that the judge's failure to resort to this procedure despite evidence at trial demonstrating the defendant's long history of irrational behavior was a violation of due process. Ibid.

Recently, in Drope v. Missouri, supra, the Court elaborated on its rationale in Robinson:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone

may, in some circumstances, be sufficient.

Id., 420 U.S. at 180.

In Drope, the Missouri procedures for determining competency, which required a judge, "upon his own motion or upon motion filed by the state or by or on behalf of the accused," to order a psychiatric examination whenever he "has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed," were found to be constitutionally adequate. Id., 420 U.S. at 173. Once again, however, the Court held that the trial judge's failure to resort to that procedure and order further inquiry on the defendant's competence, where a psychiatrist's affidavit prior to trial suggested the possibility of incompetence, the defendant's wife testified at trial to prior irrational behavior on the defendant's part, and the defendant shot himself during the course of the trial, was a denial of due process which could not be cured by a retrospective competency hearing. Id., 420 U.S. at 180, 183.

The New York procedure for determining competency, applicable at the time of appellant's trial, was similar to Missouri's in that it provided:

> If at any time before final judgment it shall appear to the Court ... that there is reasonable ground for believing that such defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, ... instead of proceeding with the trial, the Court, upon its own motion, or that of the

> district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity.
>
> Former N.Y.C.C.P. §658. Emphasis added.

Subsequent sections provided for the manner in which the psychiatric examination was to be conducted (C.C.P. §§659-661), the return of a report by the examining psychiatrists (C.C.P. §662), and the method for contesting the report (C.C.P. §662-a). A final pertinent section provided:

> If, after receiving the report of the psychiatrists and giving counsel for the defendant and the district attorney opportunity to be heard thereon, the court is of the opinion that the defendant is not in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense, the proceedings against such defendant shall be resumed as if no examination had been ordered.
>
> N.Y.C.C.P. §662-c.

Assuming that the foregoing statutory scheme for determining appellant's competency to stand trial was constitutionally adequate to protect his due process rights (United States ex rel. Evans v. LaVallee, 446 F.2d 782, 786 (2d Cir.), cert. denied, 404 U.S. 1020 (1972); People v. Hudson, 19 N.Y.2d 137, 139 (1967)),* the trial judge's failure to follow it and order

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*While both the Illinois statute in Pate and the Missouri statute in Drope contained a provision allowing the trial judge to order a competency hearing, as opposed to only an examination, on his own motion, the New York statute (C.C.P. §662-a) provides for a hearing only when requested by either party. To the extent that the New York statutory scheme does not

on his own motion, either a competency hearing or at least a further psychiatric examination prior to trial resulted in a denial of due process under the facts of the instant case.

Here, as in Drope and Robinson, appellant had exhibited irrational behavior. Justice Ryan himself observed appellant suffering "what appear[ed] to be an epileptic seizure and ... behav[ing] strangely" during his first trial in February 1968. Moreover, the judge's observations were confirmed by a report from Kings County Hospital, prepared by two psychiatrists (C.C.P. §659), that appellant was in fact suffering from "a chronic brain syndrome with convulsive disorder,"* and was unfit to proceed with trial. As a result, Justice Ryan was forced to declare a mistrial and commit appellant to Matteawan.

(Footnote continued from the preceding page)

provide for a hearing on competency on the court's own motion, it should be deemed inadequate under Pate v. Robinson, supra.

*A chronic brain syndrome or disorder has been defined as follows:

> These disorders (acute and chronic) are all characterized by a basic syndrome consisting of:
>
> 1. Impairment of orientation
>
> 2. Impairment of memory
>
> 3. Impairment of intellectual functions (comprehension, calculation, knowledge, learning, etc.)
>
> 4. Impairment of judgment
>
> 5. Liability and shallowness of effect

* * *

The significance of this prior medical opinion of appellant's incompetence, combined with the trial judge's own observation of appellant's irrational behavior at the first trial, was not diminished by the finding of the Matteawan doctors in June 1968 that appellant was then competent to

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(Footnote continued from the preceding page)

> The chronic organic brain syndromes result from relatively permanent, more or less irreversible, diffuse impairment of cerebral tissue function. While the underlying pathological process may partially subside, or respond to specific treatment, as in syphilis, there remains always a certain irreducible minimum of brain tissue destruction which cannot be reversed, even though the loss of function may be almost imperceptible clinically. The chronic brain syndrome may become milder, vary in degree, or progress, but some disturbance of memory, judgment, orientation, comprehension, and affect persists permanently.
>
> Other mental disturbances of psychotic, neurotic, or behavioral type may be superimposed on the chronic brain syndrome; when clinically significant, these will be recognized by addition of the appropriate qualifying phrase to the diagnosis.
>
> Katz, Goldstein, and Dershowitz, PSYCHOANALYSIS, PSYCHIATRY, AND LAW (1967), at 504-508.

See also Hinsie and Campbell, PSYCHIATRIC DICTIONARY (3d ed. 1965) at 103.

be tried. See Pate v. Robinson, supra, 383 U.S. at 383; United States v. Collins, 399 F.2d 705, 707 (7th Cir. 1968); People v. Gonzalez, 20 N.Y.2d 289, 293 (1967), cert. denied, 390 U.S. 1 (1968). While the methods and care with which the doctors at Matteawan conducted their examination of appellant in determining his competency are not currently known, the reports prepared have produced inappropriate findings of competence by Matteawan doctors.* People v. Jordan, 35 N.Y.2d 577 (1974).

Further, since appellant's mental disorder was diagnosed by the Kings County Hospital psychiatrists as "chronic," i.e., likely to recur, the Matteawan report that appellant was then competent was open to question. In any event, even if appellant was competent in June 1968 -- five months before his retrial -- "the competency of an accused cannot be rendered immutable historical fact, for the mental condition of an accused may change drastically in a matter of months." Rose v. United States, 513 F.2d 1251, 1257, n.5 (8th Cir. 1975) This is particularly so where, as here, the mental disorder was diagnosed as "chronic" and therefore likely to recur. Indeed, it was subsequently disclosed in Dr. Schwartz's report in August 1972, and conceded by the State at appellant's coram nobis hearing, that appellant had received continuous medication, including

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*The record is not clear as to whether this report was seen and/or examined by the Appellate Division or Judge Weinstein. It has not been made available to counsel.

Dilentin* and Phenobarbital, during the five months he was confined in the Brooklyn House of Detention pending his retrial.**

The conclusion that appellant may not have been competent at or by the time of his retrial is further supported by the fact that his attorney, Mr. Gartenhaus, who had represented appellant at the earlier mistrial and was subsequently reassigned in July 1968 to represent him, asked to be relieved of his assignment a scant five weeks before appellant's retrial because of counsel's continued belief that appellant was "insane" and needed "medical help."*** Here,

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*Although Dr. Schwartz's report refers to "Dilentin," the probable drug referred to is "Dillantin," which is an "anti-epileptic for grand mal seizures." THE MERCK INDEX (6th ed.), at 353, 368.

**At the coram nobis proceeding in October 1972, appellant testified that he was still receiving anti-convulsive drugs at Dannemora (Document #3 (Exhibit) to the record on appeal, at 11-12). Moreover, while the Brooklyn House of Detention records failed to indicate that appellant had seizures there pending his retrial, appellant asserted at his hearing on August 4, 1972, that he did have seizures. In view of the deficiencies in the New York City jails, it would not be surprising if such seizures went unnoticed. Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975).

***Although Mr. Gartenhaus' statement of October 28, 1968, was not made before Justice Ryan, it is difficult to believe that communication between judges of the same New York court is so minimal and haphazard that Justice Ryan never knew of Mr. Gartenhaus' reason for withdrawing. Upon seeing appellant represented by different counsel at his retrial, Justice Ryan could fairly have been expected to find out why Mr. Gartenhaus was no longer in the case. In any event, as was said of prosecutors in New York, judges, too, should have the burden of "letting the left hand know what the right hand is doing" (Santobello v. New York, 404 U.S. 257, 262 (1971)), particularly where a defendant's fundamental right not to be tried while incompetent is involved.

as this Court said in United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2d Cir. 1972), "The opinion of a defendant's attorney as to his ability to understand the nature of the proceedings and to co-operate in the preparation of his defense, is indeed significant and probative." See also United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1096, n.8 (2d Cir.), cert. denied, 410 U.S. 945 (1973).*

Although Mr. Nachbar, appellant's assigned counsel on the retrial in December 1968, failed to raise any question of appellant's competency, he did not have the long association, and therefore the close familiarity, with appellant that Mr. Gartenhaus had. Indeed, the record is barren of any indication that Mr. Nachbar knew of appellant's previous incompetency, whereas Justice Ryan clearly did, since he had at least presided over the earlier mistrial and committed

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*The fact that Mr. Slavin, appellant's counsel at his re-arraignment on July 11, 1968, failed to contest, and even agreed to confirm, the Matteawan report finding appellant competent should be given little weight. The endorsement sheet shows that Mr. Slavin represented appellant only on that day, and withdrew afterwards. He could hardly have been familiar with appellant's previous history or with appellant himself. Mr. Gartenhaus, however, who had "put eight months into [appellant's] case the last time," made it quite clear that had he "been in the case when [appellant] was re-arraigned, I would not have accepted that report, and as far as I was concerned, I thought that -- that we should obtain an opportunity and have a hearing on the basis of it."

appellant to Matteawan.*

Ultimately, however, the failure of appellant or his counsel to raise the issue of competency prior to or during his trial is of little moment. An incompetent defendant can not waive his right to a determination of his fitness to st stand trial (Drope v. Missouri, supra, 420 U.S. at 176; Pate v. Robinson, supra, 383 U.S. at 384; United States ex rel. Roth v. Zelker, supra, 455 F.2d at 1108; Note, Incompetency to Stand Trial, 81 Harv. L.Rev. 454, 455 (1967)), and New York's Code of Criminal Procedure, §658, anticipates this problem by providing that a judge may order at least a psychiatric examination on his own motion. People v. Smith, 3 N.Y.2d 184, 187 (1957).

Finally, as disclosed in Dr. Schwartz's report in April 1972 (Appendix "E"), appellant had a significant history of psychiatric disorder, and was confined to mental institutions on a number of occasions, prior to his trial in the instant

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*Had Justice Ryan wanted to assure himself that Mr. Nachbar knew of appellant's previous incompetency and of the possibility that appellant might still be incompetent, he could have questioned the attorney on the record as to his opinion of appellant's competency. This the trial judge failed to do. Compare United States ex rel. Roth v. Zelker, supra, 455 F.2d at 1106-1107.

case.* From January 1946 until March or November 1949, he was confined in a Kentucky state mental hospital and diagnosed to be suffering from "schizophrenia, unclassified." From October 1968 until May 1959, he was confined in Dannemora with a diagnosis of "psychosis due to convulsive disorder, epilepsy, clouded states." In January 1961, he was admitted to Bellevue and diagnosed a "sociopath." In February 1961, he was readmitted to Bellevue in a confused and "reactive" state. From 1961 to 1962, he was confined in Matteawan and diagnosed as having a "psychosis with psychopathic personality."

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*While the record does not disclose how much of appellant's previous medical history was known to Justice Ryan, its significance lies not only in its support of the fact that appellant may have been incompetent at the time of trial, but also as a perfect example of what Justice Ryan would have learned of appellant's psychiatric history had he bothered to inquire further.

Thus, there existed in this case all the factors the Drope Court found relevant in determining whether further inquiry into a defendant's competency is required. Id., 420 U.S. at 180.* Indeed, it was upon these same factors that the coram nobis court decided that a competency hearing was required, thereby implicitly finding that the trial judge should have conducted such a hearing previously. The hearing that was ultimately held, however, was inadequate to cure the due process violation which had occurred by the trial judge's failure to make the inquiry contemporaneously with the trial.

The Supreme Court has repeatedly recognized the inherent difficulties, even under the most favorable circumstances, in

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*In determining that appellant had not proved his claim of incompetency, both the coram nobis judge and the District Court placed great significance on the fact that appellant showed himself to be articulate in his demand for a prompt trial at the proceedings on October 28, 1968 (Document #3 (Exhibit C) to the record on appeal), and had given Justice Ryan no cause to question his competency at the retrial by reason of any untoward behavior. However,

> [t]his reasoning offers no justification for ignoring the uncontradicted testimony of [appellant's] history of pronounced irrational behavior. While [appellant's] demeanor at trial [or at other proceedings] might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.

Pate v. Robinson, supra, 383 U.S. at 385-386.

Indeed, if courtroom demeanor was dispositive, it would encourage otherwise competent defendants to "act out" in the courtroom to increase their chances of being found incompetent. See United States v. Marshall, 458 F.2d 446 (2d Cir. 1972).

retrospectively determining a defendant's competency as of the time of trial, and has consistently refused to permit it, requiring instead a new trial and a contemporaneous competency determination. Drope v. Missouri, supra, 420 U.S. at 183 (six year lapse);* Pate v. Robinson, supra, 383 U.S. at 387 (six year lapse); Duskey v. United States, 362 U.S. 402, 403 (1960) (per curiam) (one year lapse); but see People v. Gonzalez, supra, 20 N.Y.2d 289 (three year lapse); People v. Hudson, supra, 19 N.Y.2d 137 (three year lapse).

The coram nobis hearing in the instant case was conducted under far from the most favorable circumstances. It was held nearly four years after appellant's trial when appellant's trial attorney, who could have provided extremely pertinent testimony on the matter, had already died. While the trial judge was prepared to testify that appellant did not appear incompetent at the retrial, no contemporaneous psychiatric testimony was offered. Compare Barefield v. State of New Mexico, 434 F.2d 307, 309 (10th Cir.), cert. denied, 401 U.S. 959 (1971). Instead, a report was introduced, prepared by Dr. Schwartz, who had concluded that appellant was competent four years earlier, based on one interview with appellant in

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*In Drope, the Court made it clear by its citation to Conner v. Wingo, 429 F.2d 630, 639-640 (6th Cir. 1970), that it did not foreclose completely the possibility of holding a retrospective comptency hearing in certain cases. In Conner, however, the court placed primary reliance on the fact that the defendant's trial attorney testified at the later hearing and confirmed appellant's competency. In the instant case, appellant's trial attorney had died prior to the coram nobis hearing.

1972 and a review of medical records.* Additionally, reliance was placed on the transcript of October 28, 1968, proceeding at which Mr. Gartenhaus witndrew from the case and appellant asked for a prompt trial. Finally, despite his protestations, appellant was required to carry the unfair burden of proving his incompetence four years earlier when, had he been given the contemporaneous hearing or inquiry to which the evidence of his incompetency entitled him, the burden of proof would have been on the State at that time. People v. Santos, 43 A.D.2d 73, 76-76 (2d Dept. 1973); cf. United States v. Marbley, 410 F.2d 294, 295 (5th Cir. 1969). See Point II, infra.

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*Dr. Schwartz's conclusion that appellant was competent at his December 1968 trial is a highly questionable one. His "most important" reason for making that finding was the fact that the doctors at Matteawan had determined that appellant was fit to proceed five months prior to appellant's trial. As discussed above, at 11-13, appellant's mental condition could easily have changed between the time of his return from Matteawan and his trial. Dr. Schwartz also based his conclusion on his reading of the minutes of the trial, a function better left to the court. Finally, if nothing else, Dr. Schwartz's conclusion demonstrates "the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (Greenwood v. United States, 350 U.S. 366, 375 (1956)), since he contested the findings of other doctors who had previously determined that appellant had various mental disorders.

For these reasons, the hearing ultimately given appellant was inadequate to cure the due process error in failing to make further inquiry concerning his competency at the time of trial. Accordingly, the writ should be granted and appellant should be retried only if it is determined after further inquiry that he is currently competent to stand trial. Drope v. Missouri, supra, 420 U.S. at 183; Pate v. Robinson, supra, 383 U.S. at 386-387.

Point II

THE DISTRICT COURT'S CONCLUSION THAT THE STATE HAD THE BURDEN OF PROVING APPELLANT'S COMPETENCY AT THE OCTOBER *CORAM NOBIS* HEARING WAS CORRECT, BUT THE DISTRICT COURT ERRED IN NOT GRANTING THE WRIT OR HOLDING AN EVIDENTIARY HEARING.

Assuming, *arguendo*, that a retrospective competency hearing held four years after the trial could have adequately protected appellant's due process rights under the facts of this case (see Point I, *supra*), the hearing appellant finally received in October 1972 was inadequate.

At that hearing, the *coram nobis* court placed the burden on appellant of proving his incompetency at the December 1968 trial. The District Court found, however, that

> [i]t can be argued ... that the state should, at the coram nobis hearing, have assumed the burden of showing competency to stand trial at the coram nobis hearing. Compare *Mullaney v. Wilbur*, ___ U.S. ___, 95 S.Ct. 1881 (1975) (elements of the crime must be proved beyond a reasonable doubt) with *Drope v. Missouri*, ___ U.S. ___, 95 S.Ct. 896 (1975) (power of state to allocate burdens in post-conviction remedies).

The District Court assumed, "for the purpose of this opinion," that the State had that burden.

The District Court's assumption that the State had the burden of proving appellant's competency at the October 1972 *coram nobis* hearing was a correct one. While N.Y.C.P.L. §440.30(6), relied on by the *coram nobis* judge in his January 5, 1973, decision denying appellant relief, may legitimately

require the defendant to bear the burden of proving by a preponderance of the evidence every fact essential to support the motion, appellant in fact met that burden at the earlier coram nobis hearing on August 4, 1972. It was at that hearing that the defendant demonstrated through his testimony and other documents that he was entitled to have the trial judge conduct some further inquiry on his competency at the time of the retrial. The coram nobis judge's memorandum and order of September 22, 1972, granting appellant the retrospective competency hearing, a fortiori found that appellant had met his burden of proving that a hearing should be held.

Having decided that such a hearing, at which the State would have borne the burden of proving appellant's competence by a preponderance of the evidence (People v. Santos, supra, 43 A.D.2d at 75-76; United States v. Markley, supra, 410 F.2d at 295), should have been held, appellant could not be required, consistent with due process, to bear that burden at the subsequent nunc pro tunc hearing accorded him.

This conclusion is supported by the rationale of Jackson v. Denno, 378 U.S. 368 (1964). In Jackson, the Court was faced with the similar situation of a failure of the State trial court to -onduct a preliminary hearing on the voluntariness of the defendant's confession prior to admitting the confession in evidence. The Court held that the failure to afford the defendant such a hearing was a denial

of due process, and directed the State to provide the defendant with a retrospective hearing. The Court left little doubt, however, that the hearing it envisioned was one in which the prosecution would bear its traditional burden of proof:

> We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process.... [W]e cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly determined to be voluntary.
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> Id., 378 U.S. at 395-396. Emphasis added.

Moreover, in People v. Huntley, 15 N.Y.2d 72, 77-78 (1965), which established the procedures to be followed in New York in light of Jackson v. Denno for trials already completed, the Court clearly interpreted the required hearing on voluntariness to be similar to the one the Supreme Court directed be held prior to trial.

Thus, the prosecution bore the burden of proving appellant's competency at the October 1972 coram nobis hearing.

Since the factfinding procedure employed by the coram nobis judge, impermissibly requiring appellant to bear the burden of proof, was not adequate to afford a full and fair hearing on the question of appellant's competency, the District Court was required to hold that hearing itself. Townsend v. Sain, 372 U.S. 293, 313, 316 (1963). Moreover, the District Court could not short-circuit its obligation by

resorting only to the printed records and documents before it to determine that it "would be compelled to find no reasonable doubt that petitioner was competent to stand trial."* This is particularly so since the District Court was forced to rely on the defective coram nobis hearing minutes and the suspect report (see supra, at) of Dr. Schwartz prepared for the coram nobis hearing. Had the District Court ordered an evidentiary hearing, it could have determined, among other things, the adequacy of the report returned by the Matteawan doctors finding appellant competent.

Therefore, the order of the District Court should be reversed and the case remanded for a retrospective competency hearing in the District Court at which the State shall have the burden of proving appellant's competency.

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*Indeed, it was precisely in a situation such as this, where there was nothing more than the printed record upon which to determine retrospectively a defendant's competency, that the Supreme Court, in Robinson, supra, found it necessary to order a new trial. Thus, if there actually was nothing that a hearing could add to the District Court's determination of competency, the court should have granted the writ.

CONCLUSION

For the foregoing reasons the writ should be granted; in the alternative, the District Court should be ordered to hold a retrospective hearing to determine appellant's competency at the time of his retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 30, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Richard A. Greenberg